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Wednesday, August 25, 1999

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**UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF CALIFORNIA**

In re:

No. 98-3-3174-STC

Chapter 7

TUAN P. PHAN,  
a/k/a TUAN PHUNG PHAN,  
a/k/a TONY PHAN,  
Debtor.

\_\_\_\_\_ /

TUONG-VAN THI CAT,  
Plaintiff,  
A.P. No. 98-3-394-TC  
vs.

TUAN P. PHAN,  
a/k/a TUAN PHUNG PHAN,  
a/k/a TONY PHAN,  
Defendant.

\_\_\_\_\_ /

## MEMORANDUM

The above-entitled nondischargeability action was tried to the court on July 7, 1999. Donald H. Cram appeared for Plaintiff. Defendant appeared in pro per. Upon due consideration, and for the reasons set forth below, I determine that Defendant's liability to Plaintiff is dischargeable in Defendant's chapter 7 bankruptcy.

### FACTS

Plaintiff and Defendant are former husband and wife. Their marriage was dissolved by an order of the Circuit Court of Seminole County Florida on November 1, 1996. That order contained the following language regarding division of the couple's interest in a land trust.

The parties shall have equal interest in all three (3) land trusts as follows:

- a. 36 acre property: 25% interest shall be divided with each party having 12.5% interest.
- b. 28.5 acre property: 28.5% interest shall be divided with each party having 14.25% interest.
- c. 40 acre property: 10% interest shall be divided with each party having 5% interest.

Upon sale of the land trusts, the parties shall divide the proceeds equally, after any liabilities are paid, including the debt to Ming Yen.

Plaintiff's Exhibit 1 at 6.

Defendant sold both parties' interests in two of the properties later in November 1996. Although the purchase price was \$445,500, only \$3,060 remained after payment of the liens against the couple's interest in the properties. Defendant returned one half of the net proceeds (\$1,530) to Plaintiff in June 1987. Among the amounts deducted from the sale price for payment of liens was \$94,830 paid to Ming Yen for interest on a loan he made to the couple.

Plaintiff sued Defendant in the Seminole County Court in 1997, seeking damages arising from Defendant's sale of her interest in the land trusts. She alleged that Defendant had no authority to sell her interest, and that she had suffered damage as a result of the sale because the sale price was too low and because the interest paid to Ming Yen was usurious. The trial court found for Plaintiff. The judge found that Defendant had no authority to sell Plaintiff's interest in the land trust, that the interest specified in the Ming Yen note was usurious, and that no interest could be collected under the note. The court awarded Plaintiff \$47,415, the amount of interest paid Ming Yen from her share of the sale proceeds. The court declined to award damages on Plaintiff's claim that the sale price was too low, finding that the evidence did not support that claim.

In his oral statement of decision, the Seminole County trial judge stated twice that Defendant had breached a fiduciary duty to Plaintiff in selling the property and paying interest to Ming Yen from Plaintiff's share of the proceeds without her permission.

But what happened -- what you've got here is you have Mr. Phan is in a fiduciary relationship to Ms. Cat because of the way the final judgment was ordered.

Plaintiff's Exhibit 3 at 19:10-13.

So my ruling -- the way I see this case is Mr. Phan breached his fiduciary duty to Ms. Cat when he sold the property without telling her about it.

Id. at 24:22-25. The trial judge did not specify further the nature of the fiduciary interest involved or how it arose. Neither Plaintiff's trial brief nor her counsel's opening and closing arguments cited any authority illuminating the nature of the fiduciary interest involved.

## **DISCUSSION**

Plaintiff seeks a determination that the \$47,415 judgment against Defendant is nondischargeable under 11 U.S.C. § 523(a)(4), because it is the result of Defendant's defalcation while acting in a fiduciary capacity.<sup>(1)</sup> It is well established that whether a relationship is a "fiduciary" one for purposes of section 523(a)(4) is a federal question, and that the term does not encompass every relationship that may be considered a fiduciary one under state law. See In re Lewis, 97 F.3d 1182, 1185 (9th Cir. 1996). "The broad, general definition of 'fiduciary' is inapplicable in the dischargeability context. Instead, the fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." Id. at 1185 (citations omitted). Whether an express or technical trust exists is determined under state law. See id. at 1185.

There is no evidence that Defendant held the real property or proceeds in an express or technical trust that arose before Defendant's wrongful conduct. First, the dissolution order dividing the parties' interests in the real property contains no language suggesting the creation of a trust. Second, Plaintiff has not cited, and the court's research has not disclosed, any authority suggesting that the dissolution order created a trust by operation of Florida state law. Third, there is no evidence that Defendant was the trustee of the land trusts. The only evidence introduced on this question was Defendant's testimony that Ming Yen was the trustee of the land trusts. Fourth, the most reasonable interpretation of the Florida judge's references to fiduciary duty is that Defendant held the proceeds of the sale in constructive trust as a result of the wrongful nature of his sale of Plaintiff's interest in the real property. It is well established, however, that a constructive trust does not create a fiduciary relationship within the meaning of section 523(a)(4). "It is not enough that by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee ex maleficio. He must have been a trustee before the wrong and without reference thereto." Lewis, 97 F.3. at 1185 (quoting Davis v. Aetna Acceptance Co., 293 U.S. 328, 333 (1934)).

## CONCLUSION

Judgment will be entered for Defendant, because Plaintiff has failed to establish that Defendant was a "fiduciary" within the meaning of section 523(a)(4).

Dated: \_\_\_\_\_

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Thomas E. Carlson  
United States Bankruptcy Judge

1. In her complaint, Plaintiff also sought a determination of nondischargeability under 11 U.S.C. § 523(a)(6), on the theory that the debt in question arose as the result of Defendant's willful and malicious injury to Plaintiff. At trial, Plaintiff's counsel expressly stated that Plaintiff was no longer seeking relief under subsection (a)(6). In any event, the evidence does not support a determination of nondischargeability under subsection (a)(6). Plaintiff introduced no direct evidence that Defendant paid interest to Ming Yen with the intent to injure Plaintiff. Nor does it appear that the payment of interest to Ming Yen was so patently wrongful toward Plaintiff that Defendant's malice may be presumed. See In re Cecchini, 780 F.2d. 1440, 1443 (9th Cir.

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